

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Frontiervision Operating Partners)	
Order Setting Basic Service Rates)	CSB-A-0692
Winchester, KY (KY0079))	
)	
Frontiervision Operating Partners, L.P.)	
d/b/a/ Adelphia)	CSB-A-0693
Order Setting Basic Service Rates)	
Mt. Sterling, KY (KY0066))	

ORDER

Adopted: October 8, 2003

Released: October 10, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On June 18, 2003, Frontiervision Operating Partners, d/b/a Adelphia Communications Corporation (“Adelphia of Winchester”), filed an appeal of a Rate Order¹ adopted by the City of Winchester, Kentucky (the “City of Winchester”).² The City of Winchester filed an opposition on July 8, 2003,³ to which Adelphia of Winchester filed a reply on July 21.⁴ The Winchester Rate Order concerned

¹ Appeal of Local Rate Order (“Adelphia of Winchester Appeal”), filed June 18, 2003. The Rate Order is Order No. 2003-87, “An Order Directing That Frontiervision Operating Partners (d/b/a Adelphia) Immediately Reduce the Basic Cable Rates in Winchester, Kentucky to \$7.31 and to Refund Any Amount Collected Over \$7.31,” adopted by the City of Winchester, KY, on May 19, 2003 (the “Winchester Rate Order”). The Winchester Rate Order is Attachment 1 to Opposition to Appeal of Local Rate Order (“City of Winchester Opposition”), filed on July 10, 2003.

² On June 20, 2003, Adelphia of Winchester filed a Request for Emergency Stay of Local Rate Order, to which Winchester filed an Opposition to Request for Emergency Stay on June 30. Because we are reviewing Adelphia of Winchester’s appeal on its merits, we dismiss its stay request as moot.

³ City of Winchester Opposition. On June 30, the City of Winchester had filed a Motion for Extension of Time to File Opposition to Appeal of Local Rate [Order]. Adelphia did not oppose the Motion, and we grant it. Simultaneously with its Opposition, the City of Winchester filed a Motion to Strike Exhibit from Record, directed at Attachment 4 to Adelphia of Winchester Appeal. Attachment 4 consists of two pleadings that were filed earlier this year in another cable rate proceeding and that Adelphia believes concern the same legal issues raised in the present appeal. The City of Winchester, at page 2 of its Motion, argues that the Commission should not consider evidence and arguments that were not presented to the City. We deny the Motion because the substance of the documents to which the City of Winchester objects is argument of law or policy that Adelphia of Winchester might properly have

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the Basic Service Tier (“BST”) of cable service in the City of Winchester, where Adelphia of Winchester is the franchised cable operator.

2. On June 19, 2003, Frontiervision Operating Partners, L.P., d/b/a Adelphia Communications Corporation (“Adelphia of Mt. Sterling”), also filed an appeal of a Rate Order⁵ adopted by the City of Mt. Sterling, Kentucky (the “City of Mt. Sterling”).⁶ The City of Mt. Sterling filed an opposition on July 8, 2003,⁷ to which Adelphia of Mt. Sterling filed a reply on July 21.⁸ The Mt. Sterling Rate Order concerned the BST of cable service in the City of Mt. Sterling, where Adelphia of Mt. Sterling is the franchised cable operator.

3. The material facts and legal issues in these two appeals are very similar. Accordingly, in the interests of administrative efficiency, we are deciding both of them in this one Order. In brief, we conclude that on the facts of these two cases, each Adelphia Company should have been allowed to make the change in its BST rate that it proposed to make. That change was to increase the rate it had been charging for more than a year to the maximum permitted rate (“MPR”). Accordingly, we grant both appeals.

II. BACKGROUND

4. The Communications Act provides that, where effective competition is absent, rates for the BST and associated equipment are subject to regulation by franchising authorities.⁹ Rates for the BST and equipment should not exceed rates that would be charged by systems facing effective competition, as

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placed in its Appeal and Reply. To the extent that the documents allege facts that concern other cities or were not presented to the City of Winchester, we disregard them.

⁴ Reply to Opposition to Appeal of Local Rate Order, filed on July 18, 2003.

⁵ Appeal of Local Rate Order (“Adelphia of Mt. Sterling Appeal”), filed June 19, 2003. The Rate Order is Order No. 11-03, “An Order Directing Frontiervision Operating Partners (d/b/a) Adelphia Immediately Reduce the Basic Cable Rates in Mt. Sterling, Kentucky to \$12.75 and to Refund Any Amount Collected Over \$12.75,” adopted by the City of Mt. Sterling, KY, on May 20, 2003 (the “Mt. Sterling Rate Order”). The Mt. Sterling Rate Order is Attachment 1 to Opposition to Appeal of Local Rate Order (“City of Mt. Sterling Opposition”), filed on July 10, 2003.

⁶ On June 20, 2003, Adelphia of Mt. Sterling filed a Request for Emergency Stay of Local Rate Order, to which the City of Mt. Sterling filed an Opposition to Request for Emergency Stay on June 30. Because we are reviewing Adelphia of Mt. Sterling’s appeal on its merits, we dismiss its stay request as moot.

⁷ City of Mt. Sterling Opposition. On June 30, the City of Mt. Sterling had filed a Motion for Extension of Time to File Opposition to Appeal of Local Rate [Order]. Adelphia did not oppose the Motion, and we grant it. Simultaneously with its Opposition, the City of Mt. Sterling filed a Motion to Strike Exhibit from Record, directed at Attachments 3 and 4 to the Adelphia of Mt. Sterling Appeal. Attachment 3 is a May 16 letter from Adelphia of Mt. Sterling’s counsel to the City of Mt. Sterling’s counsel. Attachment 4 consists of the two pleadings referred to in footnote 3 above. The City of Mt. Sterling, at page 2 of its Motion, argues that the Commission should not consider evidence and arguments that were not presented to the City. We deny the Motion for the same reasons, and to the extent, stated in footnote 3 above.

⁸ Reply to Opposition to Appeal of Local Rate Order, filed on July 18, 2003.

⁹ 47 U.S.C. § 543(a)(2).

determined in accordance with Commission regulations for setting rates.¹⁰ If the cable operator fails to meet its burden of proof, has improperly calculated its rates, or is unresponsive to requests for relevant information, the franchising authority may use the “best information available” to review the operator’s proposed rates and, if appropriate, adjust them and order refunds.¹¹

5. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.¹² In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority’s decision as long as a rational basis for that decision exists.¹³ The Commission will reverse a franchising authority’s rate decision only if it determines that the franchising authority acted unreasonably in applying the Commission’s rules. If the Commission reverses a franchising authority’s decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission’s decision on appeal.

III. DISCUSSION

A. Facts.

6. Winchester. In late March 2002, Adelphia of Winchester filed its 2002 Form 1240 to establish BST rates in the City of Winchester for the 12-month period beginning July 1, 2002.¹⁴ On the Form, Adelphia of Winchester stated that its MPR would be \$8.4055 per month,¹⁵ but that its “Rate Structure as of July 1, 2002” would be \$7.31.¹⁶ Adelphia of Winchester left Line I10 on the Form (“Operator Selected Rate For Projected Period” or “OSR”) blank.¹⁷ The City of Winchester took no action on Adelphia’s Form.¹⁸ Therefore, pursuant to Commission rules,¹⁹ Adelphia of Winchester was authorized to put its proposed rates into effect at the end of the standard 90-day review period, on July 1, 2002.

7. Adelphia of Winchester continued charging \$7.31 per month for its BST, as it had since 1999.²⁰ In April 2003, however, Adelphia raised its monthly BST rate to \$8.40.²¹ On May 19, 2003, after

¹⁰ 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

¹¹ 47 C.F.R. § 76.937(d); *Falcon Classic Cable*, 15 FCC Rcd 5717, 5720 (2000) ¶ 10; *Western Reserve Cablevision, Inc.*, 14 FCC Rcd 13391, 13398 (1999) ¶ 12.

¹² 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

¹³ *Harron Commun. Corp.*, 15 FCC Rcd 7901 (2000) ¶ 2; *Implementation of Sections of the Cable Television Consumer Protection & Competition Act*, 8 FCC Rcd 5631 (1993), 9 FCC Rcd 4316, 4346 (1994) ¶ 81.

¹⁴ Adelphia of Winchester Appeal at 2; City of Winchester Opposition, Attachment 2 at 1.

¹⁵ City of Winchester Opposition, Attachment 2 (Adelphia of Winchester’s 2002 Form 1240) at 4, Part III, line I9; Exhibit I.

¹⁶ *Id.*, Exhibit I.

¹⁷ *Id.*, Attachment 2 at 4, Part III, line I10.

¹⁸ Winchester Rate Order, *supra* note 1, at 1.

¹⁹ 47 C.F.R. § 76.933(g)(2).

²⁰ Adelphia of Winchester Appeal at 2-3.

a public hearing, the City issued the Rate Order under review here, which ordered Adelphia to reinstate the BST rate of \$7.31 and to make refunds.²²

8. Mt. Sterling. In late March 2002, Adelphia of Mt. Sterling filed its 2002 Form 1240 to establish BST rates in the City of Mt. Sterling for the 12-month period beginning July 1, 2002.²³ On the Form, Adelphia of Mt. Sterling stated that its MPR would be \$14.2383 per month,²⁴ but that its “Rate Structure as of July 1, 2002” would be \$12.75.²⁵ Adelphia of Mt. Sterling left Line I10 on the Form, for the OSR, blank.²⁶ The City of Mt. Sterling took no action on Adelphia of Mt. Sterling’s Form.²⁷ Therefore, pursuant to Commission rules,²⁸ Adelphia of Mt. Sterling was authorized to put its proposed rates into effect at the end of the standard 90-day review period, on July 1, 2002.

9. Adelphia of Mt. Sterling continued charging \$12.75 per month for its BST, as it had since 2001.²⁹ In May 2003, however, Adelphia of Mt. Sterling announced that on July 1, 2003, its monthly BST rate would rise to \$14.24.³⁰ On May 20, 2003, after a public hearing, the City of Mt. Sterling issued the Mt. Sterling Rate Order under review here, which ordered Adelphia of Mt. Sterling to hold its BST rate at \$12.75.³¹

B. Analysis

10. Each City interprets our rules to allow its Adelphia Company to change the BST rate it charges (“the actual rate”) only at the end of the 90-day review period, which in these cases is July 1, 2002.³² According to each City, Adelphia of Winchester was not allowed to change its actual rate months

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²¹ Winchester Rate Order, *supra* note 1, at 1; Adelphia of Winchester Appeal at 1. Adelphia of Winchester had notified the City of its intention to do so. Winchester Rate Order, *supra* note 1, at 1.

²² Winchester Rate Order, *supra* note 1.

²³ Adelphia of Mt. Sterling Appeal at 2; City of Mt. Sterling Opposition, Attachment 2.

²⁴ Mt. Sterling Appeal, Attachment 2 (Adelphia of Mt. Sterling’s 2002 Form 1240) at 4, Part III, line I9.

²⁵ *Id.*, Exhibit I.

²⁶ *Id.*, Attachment 2 at 4, Part III, line I10.

²⁷ Mt. Sterling Rate Order, *supra* note 5, at 1.

²⁸ *See supra* note 19.

²⁹ Adelphia of Mt. Sterling Appeal at 2.

³⁰ Mt. Sterling Rate Order, *supra* note 5, at 1-2; Adelphia of Mt. Sterling Appeal at 1. Adelphia of Mt. Sterling had notified the City of its intention to do so, in either April or May 2003 or both. Mt. Sterling Rate Order, *supra* note 5, at 1-2. The Mt. Sterling Rate Order, at pages 1-2, states that the \$14.24 rate was scheduled to take effect on July 1, 2003, although the same pages indicate that the rate may have increased slightly earlier.

³¹ Mt. Sterling Rate Order, *supra* note 5. The Mt. Sterling Rate Order also ordered refunds. *Id.* at 2. On the present record, however, it appears that the proposed BST rate increase did not take effect. Adelphia of Mt. Sterling described the \$14.24 rate as “the rate adjustment Adelphia intends to implement on July 1, 2003,” and the Mt. Sterling Rate Order was issued in May. Adelphia of Mt. Sterling Appeal at 1; Mt. Sterling Rate Order, *supra* note 5, at 3.

³² Each Adelphia Company filed its 2002 Form 1240 slightly more than 90 days before July 1, 2002, but each filing was clearly timed with the 90-day review period of our rules in mind. *See* Adelphia of Winchester Appeal at 2; Adelphia of Mt. Sterling Appeal at 2; *supra* note 19.

later, and Adelphia of Mt. Sterling was not allowed to change its actual rate a year later without filing a new Form 1240. Each City cites several of our rules in support of its position. Some of these rules, each City claims, contemplate actual rates changing only at the end of the 90-day review period.³³ Other rules, according to each City, specifically authorize actual rate changes after the end of the 90-day review period only in a few extraordinary circumstances.³⁴ These latter exceptions, in each City's interpretation, prove the rule that, ordinarily, changes in actual rates may occur only at the end of the 90-day review period.

11. We disagree with the Cities' interpretation of our rules. None of those rules states explicitly what the Cities read into them, that actual rate changes may occur only at the end of the 90-day review period. None of them explicitly forbids actual rate changes at other times.³⁵ Rather, the first rules the Cities cite merely create a procedure for a cable operator to file a Form 1240 at annual or longer intervals, and thus perhaps to justify a rate change.

12. Section 76.922(e)(1), for example, states that "operators . . . may not adjust their rates more than annually to reflect" certain factors.³⁶ This rule prohibits rate changes more frequently than once a year, but does not require that any change in the actual rate occur only at the end of the 90-day review period. Section 76.922(e)(2) states that a cable operator "may adjust its rates to reflect [certain listed factors] that are projected for the 12 months following the date the operator is scheduled to make its rate adjustment . . ."³⁷ Section 76.922(e)(2)(i) states that a cable operator's rate "may be adjusted annually to project for" inflation in the 12 months after a scheduled rate change, based on inflation in a recent twelve-month period.³⁸ Section 76.922(e)(2)(ii)(A) states that rates "may be adjusted annually to reflect . . . projections in [certain] external costs for the 12-month period on which the filing is based."³⁹ The later three rules use the words "may," and "reflect" or "project for," rather than "must" and "recover

³³ 47 C.F.R. § 76.922(e)(1), (2)(ii)(A). See City of Mt. Sterling Opposition at 8-10; City of Winchester Opposition at 9-11.

³⁴ 47 C.F.R. §§ 76.922(e)(2)(iii)(B, C), 923(o). See City of Mt. Sterling Opposition at 10-11; City of Winchester Opposition at 11. Each City appears to mistakenly cite the first of these rules as 47 C.F.R. §§ 76.922(e)(2)(ii)(B, C).

³⁵ Some statements in our decisions are consistent with allowing rate increases at other times. *Charter Commun.*, 17 FCC Rcd 13775, 13776 (2002) ¶ 6 ("if a local franchising authority does not dispute the bases for the figures presented in a cable operator's rate forms and has not discovered any mathematical errors in the forms, the LFA should approve the operator's rate as derived from those forms."); *CoxCom, Inc.*, 17 FCC Rcd 7931, 7936-37 (2002) ¶ 14 ("Nothing in the Commission's rules or Form 1240 instructions requires an operator to implement a rate increase after the initial 90-day review period has passed but before the franchising authority acts or limits the amount of an increase to a previously noticed rate, as long as the increase does not exceed the MPR and the franchising authority and subscribers have notice of the actual rate being implemented."), *application for review denied*, 18 FCC Rcd 6941(2003); *TCI Cablevision of California, Inc.*, 15 FCC Rcd 9119 (2000) ¶ 6 ("A cable operator must be allowed to charge up to the maximum permitted rates derived from its rate forms.").

³⁶ 47 C.F.R. § 76.922(e)(1).

³⁷ 47 C.F.R. § 76.922(e)(2).

³⁸ 47 C.F.R. § 76.922(e)(2)(i).

³⁹ 47 C.F.R. § 76.922(e)(2)(ii)(A).

all the costs associated with.” They do not require the cable operator to do anything or, more specifically, to make any change in actual rates only at the end of the 90-day review period.⁴⁰

13. The specific rules about three kinds of rate changes that may occur after the 90-day review period, which the Cities characterize as exceptions to the general prohibition,⁴¹ allow such changes when federal or local law requires that the cable operator add channels⁴² and when the cable operator unilaterally adds channels⁴³ or offers new equipment⁴⁴ after the end of the 90-day review period. These rules concern specific unusual events that increase the operator’s costs, and therefore presumably its MPR, after the end of the 90-day review period. These rules specify procedures to be followed in these three instances. None of these rules explicitly prohibits other kinds of rate increases after the end of the 90-day review period. Nor do they, even implicitly, touch on the propriety of the kind of rate increase that each Adelphia Company effected -- an increase in the actual rate up to the previously approved MPR to recover costs that have already been documented.

14. Neither City objected to its Adelphia Company’s 2002 Form 1240. Neither City pointed out errors or objected to the absence of an OSR. Apparently, neither City reviewed and acted on its Adelphia Company’s Form until more than a year after it was filed. The Cities cannot now object to those filings, much less order refunds. Accordingly, we conclude that the Cities’ are mistaken in their interpretation of our rules. Our rules allow the increases in actual rates that the Adelphia Companies effected.

15. Several equitable factors also support the Adelphia Companies’ appeal. The Cities correctly point out that each Adelphia Company states on its 2002 Form 1240 that its “Rate Structure as of July 1, 2002” would be the BST rate it had been charging. On the same Form, however, each company also justified charging a higher rate, its MPR, and left blank the line for the OSR. From the latter, each City should have been aware that the Adelphia Company might want to raise its actual rate. Each Form, lacking all the information required on it, arguably was “facially incomplete”⁴⁵ and entitled each City to demand that the company fill in Line I10. Under our rules, incomplete rate forms toll the review process if the local franchising authority is unable to proceed with its review.⁴⁶ Neither City, however, requested that the OSR be provided or otherwise contested the Form 1240 that had been filed with it.

16. Neither City may claim that its Adelphia Company caused it unfair surprise or violated the legitimate expectations of BST subscribers for rate stability. The pleadings do not indicate that either Company failed to provide the necessary subscriber notice of the actual rate change.⁴⁷ Each Adelphia

⁴⁰ This same analysis applies to the language that the Cities quote from the decision in *Comcast Cable Commun., Inc.*, 18 FCC Rcd 4540, 4542 (2003) ¶ 6, *application for review pending*. City of Mt. Sterling Opposition at 11; City of Winchester Opposition at 11-12.

⁴¹ See *supra* note 34.

⁴² 47 C.F.R. § 76.922(e)(2)(iii)(B).

⁴³ 47 C.F.R. § 76.922(e)(2)(iii)(C).

⁴⁴ 47 C.F.R. § 76.923(o).

⁴⁵ *TCI Cablevision of Dallas, Inc.*, 15 FCC Rcd 7379, 7381 (2000) ¶ 8; *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 11 FCC Rcd 388, 427 (1995) ¶ 95.

⁴⁶ 47 C.F.R. § 76.933(g).

⁴⁷ 47 C.F.R. § 76.1603(b).

Company raised its actual rate only to the previously authorized MPR. Although our rules generally protect subscribers from rate increases more than once a year,⁴⁸ neither company had raised its actual BST rate for a year.⁴⁹ We note that, by effecting their rate increases in April and May 2003, each Adelphia Company has precluded itself from changing its rates again until April and May 2004, as the case may be.⁵⁰ Finally, for us to uphold the Cities' decisions would give cable operators an incentive to increase their actual rates all the way to their MPRs at the earliest possible date. We do not wish to provide that incentive. Rather, we want to give free rein to any operator's inclination to restrain a rate increase that our rules allow.

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that the Appeals filed by Frontiervision Operating Partners and Frontiervision Operating Partners, L.P., both d/b/a Adelphia Communications Corporation, in CSB-A-0692 and CSB-A-0693, respectively, **ARE GRANTED**.

18. **IT IS FURTHER ORDERED** that the Requests for Emergency Stay of the local rate orders issued by the Cities of Winchester and Mt. Sterling, which were filed by Frontiervision Operating Partners, **ARE DISMISSED**.

19. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules. 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton
Deputy Chief, Policy Division, Media Bureau

⁴⁸ See *supra* ¶¶ 11-12.

⁴⁹ See *supra* nn.20, 29.

⁵⁰ 47 C.F.R. § 76.922(e). Exceptions to this rule are discussed in paragraph 13 in the text above.